IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 99-09, PATRICIA KINSEY	: : :	SC CASE NO. 96,629

JUDICIAL QUALIFICATIONS COMMISSION'S RESPONSE TO RESPONDENT'S MOTION FOR REHEARING

The Judicial Qualifications Commission, by and through its undersigned counsel and pursuant to Fla. R. Civ. P. 9.330(a), hereby files its Response to Respondent's Motion for Rehearing. For ease of reference, the JQC's Response follows the correspondingly numbered sections of Respondent's Motion for Rehearing:

RESPONSE

1. Respondent first contends that this Court erred when it found that her comment that it is a judge's responsibility to be "absolutely a reflection of what the community wants" was violative of Canon 7A(3)(a) because the "comment was not alleged as the basis of a violation in the notice of formal charges and was

not addressed by either respondent or [the] JQC in their briefs." *See* Motion for Rehearing at 2. Additionally, Respondent contends that the comment cannot be "reasonably encompassed by the allegation of 'hostility or apparent hostility towards defendants in criminal cases'" [as alleged in paragraph 4 of the Amended Notice of Formal Charges]. *Id*.

By way of background, Charge No. 4 of the Formal Charges alleged that Respondent made comments during a radio broadcast that "exhibited a hostility or apparent hostility towards defendants in criminal cases." Although Respondent's comment that a judge's responsibility is to be "absolutely a reflection of what the community wants" is not specifically set forth in the Formal Charges, the Formal Charges do not purport to delineate every objectionable comment made during the radio broadcast. In fact, Charge No. 4 specifically alleges that the comments quoted therein are "example[s]" of Respondent's efforts to pander to community sentiment that she demonstrate partiality towards law enforcement and victims of crime.

Furthermore, this court is constitutionally authorized to "accept, reject, or modify in whole or in part

the findings, conclusions, and recommendations" of the JQC. *See* art. V, § 12(c), *Fla. Const*. In this case, the Hearing Panel condemned Respondent's comment that a judge's responsibility is to be "absolutely a reflection of what the community wants," reasoning that a judge has a higher duty of impartiality rather than to merely reflect what the community wants on a particular issue." *See* Findings and Recommendations at 24. Although this court did not adopt in whole the Hearing Panel's findings with respect to Charge No. 4, this court is certainly free to accept whatever portions of the Hearing Panel's findings it deems supported by the evidence. *Cf. Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (holding that "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis upon which to support the judgment in the record."). Accordingly, Respondent's Motion for Rehearing should be denied as to the first ground alleged.[1]

---

[1] Parenthetically, contrary to Respondent's assertion that she is entitled to "consider community values in determining an appropriate sentence," Canon 3B(2) of the Code states that "[a] judge shall be faithful to the law . . . and not be swayed by partisan interests, public clamor, or fear of criticism." *See also* Canon 7A(3)(a). As this court admonished in *Inquiry Concerning A Judge (McMillan)*, 797 So. 2d 560,

2. Respondent's second ground for rehearing is equally unavailing. In what may only be characterized as a half-hearted argument, Respondent contends that this court apparently overlooked the Eleventh Circuit's recent opinion in *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), which she contends is "directly on point" and "supports her contention that . . . minor, acknowledged errors in the two brochures [which are the subject of Charge Nos. 7 and 9] are not knowing misrepresentations but are speech protected by the First Amendment to the United States Constitution." *See* Motion for Rehearing at 4.

In *Weaver*, the Eleventh Circuit invalidated an idiosyncratic canon of the Georgia Code of Judicial Conduct, which prohibited candidates for judicial office from, *inter alia*, using or participating in any form

---

571 (2001):

> The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice.

McMillan, 797 So. 2d at 571.

of public communication which the candidate knew or reasonably should have known was false, fraudulent, misleading or deceptive. *Weaver*, 309 F.3d at 1315. In finding that the Georgia canon was not narrowly tailored to serve the compelling state interest of prohibiting deliberately false speech, the Eleventh Circuit reasoned that:

> Canon 7(B)(1)(d) not only prohibits false statements knowingly or recklessly made, *it also prohibits false statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results*.

Id. at 1320. Thus, the court concluded that the canon did not provide the requisite "breathing space" to prevent a chilling effect on protected speech. *Id*. at 1319-1320.

In contrast to the Georgia canon under scrutiny in *Weaver*, Florida's Canon 7A(3)(d)(iii), under which Respondent was found guilty, provides that a candidate for judicial office shall not:

> *knowingly* misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

See Canon 7A(3)(d)(iii), Florida Code of Judicial Conduct (emphasis added). Thus, unlike the Georgia canon relied upon by Respondent, Canon 7A(3)(d)(iii) is narrowly tailored because it prohibits only deliberately false statements, as opposed to negligent misstatements as well. Moreover, contrary to Respondent's dismissal of her false statements as "minor, acknowledged errors," this Court found clear and convincing evidence that Respondent made *knowing* misrepresentations regarding the incumbent's handling of two separate cases and that her clear intention was to mislead voters. *See* Slip Opinion at 23 -25.

Accordingly, this Court should deny Respondent's Motion for Rehearing as to this ground as well.

[Signature to appear on following page]

THOMAS C. MACDONALD, JR., ESQ.
Florida Bar No. 049318
General Counsel
Florida Judicial Qualifications Comm'n

LANSING C. SCRIVEN, ESQ.
Florida Bar No. 729353
LANSING C. SCRIVEN, P.A.
Co-Special Counsel

1110 Thomasville Road
Tallahassee, FL 32309
850/488-1581

442 West Kennedy Blvd., Suite 280
Tampa, FL 33606
813/254-8700

–and–

MARVIN E. BARKIN, ESQ.
Florida Bar No. 003564
MICHAEL K. GREEN, ESQ.
Florida Bar No. 763047
TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL, & MULLIS
Professional Association
Co-Special Counsel
Post Office Box 1102
Tampa, FL 33601-1102
813/223-7474

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Judicial Qualifications Commission's Response to Respondent's Motion for Rehearing** has been furnished by U.S. Mail to **BROOKE S. KENNERLY,** Executive Director, Judicial Qualifications Commission, Mount Vernon Square, 1110 Thomasville Road, Tallahassee, FL 32309; **THOMAS C. MacDONALD, JR., ESQ.**, General Counsel, Judicial Qualifications Commission, Mount Vernon Square, 1110 Thomasville Road,

Tallahassee, FL 32303; **MARVIN E. BARKIN, ESQ.,** Trenam, Kemker, Scharf, Barkin, Frye, O'Neill, & Mullis, P.A., Post Office Box 1102, Tampa, FL 33601; **JOHN R. BERANEK, ESQ.,** Counsel, Hearing Panel, Ausley & McMullen, 227 South Calhoun St., P.O. Box 391, Tallahassee, FL 32301; **THE HONORABLE JAMES R. JORGENSON**, Third District Court of Appeal, 2001 SW 117th Avenue, Miami, FL 33175-1716; and **ROY M. KINSEY, JR.**, Kinsey, Troxel, Johnson & Walborsky, P.A., 438 E. Government St., Pensacola, FL 32501, this _____ day of February, 2003.

_____

Attorney